

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ABBOTT CARDIOVASCULAR	)	
SYSTEMS, INC. and ABBOTT	)	Civil Action No. 98-80 (SLR)
LABORATORIES, INC.,	)	(Consolidated with C.A. No. 98-314 (SLR) and
Plaintiffs,	)	C.A. No. 98-316 (SLR))
	)	
v.	)	<b>PUBLIC VERSION</b>
	)	
	)	
MEDTRONIC VASCULAR, INC. and	)	<b>Original Filed: November 30, 2007</b>
MEDTRONIC USA, INC.,	)	<b>Public Version Filed: December 3, 2007</b>
Defendants.	)	
	)	
	)	

**RESPONSE TO ABBOTT'S SUPPLEMENTAL SUBMISSION**

Abbott cites "subsequent authority" in its supplemental submission (D.I. 808) related to its motion for a permanent injunction (D.I. 725). The cited case, *Acumed LLC v. Stryker Corporation*, an unreported decision from the District of Oregon, is inapposite and does not constitute persuasive "subsequent authority," much less binding authority, for at least four reasons:

1. Abbott points out that *Acumed* involved a medical device, once again trying to lump together all medical devices, as if all implicate the same public health issues. What Abbott ignores is that in *Acumed*, the medical device at issue was not a life-saving device like a cardiac stent, but rather, in contrast to this case, a screw for treating upper-arm bone fractures. (See Answering Brief (D.I. 781) at 24-34.) This Court already recognized the important public health concerns regarding the availability of stents in *Cordis Corp. v Boston Scientific Corp.*, 2003 U.S. Dist. LEXIS 21338, at \*6 (D. Del. Nov. 21, 2003), *aff'd*, 2004 U.S. App. LEXIS 11557 (Fed. Cir. May 28, 2004) (denying preliminary injunction despite finding likelihood of success on

merits, among other reasons, because of important public health concern in depriving the public of the best and safest medical devices by limiting competition).

2. In *Acumed*, the alleged infringer's expert testimony regarding public safety was offered by doctors who arguably had a financial stake in the outcome of the case (Opinion at 17), rather than declarations from multiple unpaid physician witnesses, such as Drs. Badger, Ebersole, and Tolleson here.

3. In *Acumed*, the alleged infringer had a dominating market share, and the patentee was "not even on the map." (Opinion at 13.) That situation contrasts sharply with that here, where Abbott alleges irreparable harm even though it is the party in the dominant market position in bare metal stents. As confirmed by applicable case law, this does not constitute "irreparable harm." (See Answering Brief (D.I. 781) at 9.)

4. The court in *Acumed* applied the *eBay* factors after a complete determination on the merits by the Federal Circuit. Here, by contrast, the case - including the Court's claim construction - has not yet been considered on appeal. Further, the patents at issue are currently under reexamination by the PTO.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Karen Jacobs Loudon

Karen Jacobs Loudon (#2881)

1201 N. Market Street

P.O. Box 1347

Wilmington, DE 19899-1347

(302) 658-9200

Attorneys for Defendants Medtronic Vascular, Inc and  
Medtronic USA, Inc.

OF COUNSEL:

Kevin S. Rosen  
Matthew A. Hoffman  
Anthony S. Newman  
GIBSON, DUNN & CRUTCHER LLP  
333 South Grand Avenue  
Los Angeles, CA 90071-3197  
(213) 229-7000

H. Mark Lyon  
Frederick S. Chung  
GIBSON, DUNN & CRUTCHER LLP  
1881 Page Mill Road  
Palo Alto, CA 94304-1211  
(650) 849-5300

December 3, 2007

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on December 3, 2007 I electronically filed the foregoing with the Clerk of the Court using CM/ECF which will send notification of such filing to Frederick L. Cottrell, III.

I further certify that on December 3, 2007 I served copies of the foregoing to the following counsel in the manner indicated:

**BY HAND & EMAIL**

Frederick L. Cottrell, III  
Anne Shea Gaza  
Richards Layton & Finger  
One Rodney Square  
P.O. Box 551  
Wilmington, DE 19899

**BY EMAIL**

J. Michael Jakes  
Michael A. Morin  
Finnegan Henderson Farabow Garrett & Dunner LLP  
901 New York Avenue, NW  
Washington, DC 20001-4413

*/s/ Karen Jacobs Louden*

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Karen Jacobs Louden (# 2881)